No. 80-6949

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1980

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JACOB JOHN DOUGAN, JR.,

Petitioner,

-v-

STATE OF FLORIDA,

Respondent.

_____/

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF FLORIDA

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINION BELOW

The opinion of the Supreme Court of Florida is reported at 398 So.2d 439 (Fla. 1981).

JURISDICTION

Respondent has no quarrel with the jurisdiction of this Court pursuant to Title 28, United States Code, § 1257(3), or any other provision thereof, at least for the purpose of determining whether to decline assumption thereof.

QUESTIONS PRESENTED

I

WHETHER PETITIONER'S DEATH SENTENCE WAS IMPOSED IN AN ARBITRARY AND CAPRICIOUS MANNER IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WHERE THE DEATH SENTENCE WAS BASED IN PART ON THE AGGRAVATING CIRCUMSTANCES ENUMERATED IN FLA.STAT. § 921.141 (5)(a and b) AND THESE AGGRAVATING CIRCUMSTANCES FACTUALLY DID NOT EXIST.

II

WHETHER PETITIONER'S DEATH SENTENCE WAS IMPOSED IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AS DETAILED IN THIS COURT'S DECISION IN LOCKETT v. OHIO, 438 U.S. 586 (1978), WHERE THE TRIAL COURT AT A RESENTENCE HEARING ALLEGEDLY REFUSED TO EVEN CONSIDER SUBSTANTIAL APPLICABLE MITIGATING CIRCUMSTANCES PRESENTED BY PETITIONER.

III

WHETHER PETITIONER WAS DENIED HIS RIGHT TO A FAIR RESENTENCING PROCEEDING BEFORE A NEUTRAL AND DETACHED JUDGE, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WHERE THE JUDGE DECIDED THE ISSUE OF HIS OWN DISQUALIFICATION; AND REFUSED TO DISQUALIFY HIMSELF AFTER THE PETITIONER HAD MOVED TO DISQUALIFY THE JUDGE FOR BIAS AND PREJUDICE.

STATEMENT OF THE CASE

In March 1975, Petitioner, Jacob Dougan, was convicted and sentenced to death for the first degree murder of Stephen Orlando following a recommendation of death by the jury. The judgment and sentence were affirmed by the Supreme Court of Florida following a full and careful review of the record and written findings of the trial court in support of sentence. Barclay v. State, 343 So.2d 1266 (Fla. 1977), cert. denied, 439 U.S. 892 (1978). On March 22, 1977, this Court determined that a trial court violated a defendant's rights under the Due Process Clause of the Fourteenth Amendment to the United States Constitution when it imposed a sentence of death after considering matters in a presentence investigation report without affording the defendant the opportunity to explain or rebut those matters. Gardner v. Florida, 430 U.S. 349 (1977). Following Gardner, the Supreme Court of Florida took it upon itself to order each court which had sentenced a defendant to death to inform the court whether it had done so in violation of Gardner. In response to that order, issued on May 6, 1977, the court which had sentenced

petitioner to death stated that petitioner had been made fully aware of all matters considered by the court in sentencing. In an abundance of caution, however, the Supreme Court of Florida ordered the sentencing court to hold a hearing for the sole purpose of allowing petitioner to explain or rebut matters contained in the presentence investigation report which had been prepared in his case. Barclay v. State, 362 So.2d 657 (Fla. 1978).

Following that hearing the sentencing court reimposed the original sentence of death and the Supreme Court of Florida affirmed. Dougan v. State, 398 So.2d 439 (Fla. 1981). It is from this holding that the instant petition arises.

ARGUMENT

I

WHETHER PETITIONER'S DEATH SENTENCE WAS IMPOSED IN AN ARBITRARY AND CAPRICIOUS MANNER IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WHERE THE DEATH SENTENCE WAS BASED IN PART ON THE AGGRAVATING CIRCUMSTANCES ENUMERATED IN FLA.STAT. § 921.141 (5)(a and b) AND THESE AGGRAVATING CIRCUMSTANCES FACTUALLY DID NOT EXIST.

On August 21-23, 1979, a full plenary hearing was held in response to the order issued in Barclay, 362 So.2d 657. The order limited the scope and purpose of the hearing as follows:

> To assure that the sentencing procedure in this case satisfies the constitutional command of the Due Process Clause, the death sentences are vacated and the cause is remanded to the trial court. The court is directed to provide a hearing at which the defense has the opportunity to rebut any of the information contained in the presentence investigation reports, whether in the confidential portion of the report or any other part. This direction, of course, requires that the defense have access to the reports-in-full with sufficient time before the hearing to prepare rebuttal. Following the hearing the court is to impose

> sentences. If death is imposed as to either appellant there will be available in this Court review, limited to matters related to compliance with this order. [Emphasis added.]

362 So.2d at 658.

Temporary jurisdiction was thus relinquished for the sole purpose of affording petitioner an opportunity to respond to the presentence investigation report that had been used at his initial sentencing. That was done herein. The trial court in an abundance of caution allowed extraneous testimony of twenty-six witnesses on behalf of petitioner to be heard at the hearing. Nonetheless, at the conclusion of the hearing, the trial court, having heard nothing to merit relief via Gardner or in mitigation of sentence, reimposed the death sentence which had been vacated.

As a general rebuttal to the issues raised by petitioner on appeal to the Supreme Court of Florida, respondent successfully argued to that court that it should limit its review to a determination of whether petitioner had presented any evidence at the hearing that would justify a finding that the sentence of death was inappropriate. Respondent contended, and repeats the contention here, that petitioner presented no evidence whatsoever in explanation of or rebuttal to the presentence investigation report but, rather, had merely presented testimony in mitigation of sentence wholly outside the limited scope of the hearing. Furthermore, the courts below agreed that the testimony presented failed to justify any conclusion other than that originally reached in sentencing petitioner to death. Dougan, 398 So.2d, at 440-441.

The extent to which petitioner failed to understand or appreciate the limited scope of the Gardner relief he was afforded was best expresed by the court as follows:

> Counsel for Dougan filed multiple motions during the course of the Gardner remand proceeding, not one of which was directed to the mandate we had issued. Treating the remand as an opportunity to revisit the constitutionality of the death penalty, the bias of the trial judge, the impropriety of articulated aggravating circumstances found in the original sentencing order, and a range of other matters unrelated to our directive, Dougan's counsel endeavored to treat the remand as a full-blown sentencing proceeding. The trial judge properly rejected counsel's attempt to expand the proceeding. Songer v. State, 365 So.2d 696 (Fla.1978), cert. denied, 441 U.S. 956, 99 S.Ct. 2185, 60 L.Ed.2d 1060 (1979).
>
> Our vacation of Dougan's death sentence for Gardner relief was technically based, serving the sole purpose of allowing Dougan's counsel to demonstrate that matters contained in the pre-sentence investigation report were improper and prejudicial. Dougan has now had that opportunity, and from the record he has failed to show that any information contained in the pre-sentence investigation report was in any way erroneous, misleading or prejudicial.

Id. at 440.

The defendant in Songer v. State, 365 So.2d 696 (Fla. 1978), cert. denied, 441 U.S. 956 (1979), had similarly contended that the Gardner relief order in his case had had the effect of entitling him to a new sentencing hearing, complete with jury. The Supreme Court of Florida held that the lower court had properly rejected Songer's attempts to expand the hearing beyond the limited scope envisioned by this Court in Gardner. In fact, the court upheld the lower court's refusal to permit Songer to offer evidence in mitigation of sentence since it "was not relevant at the hearing on remand. That hearing was only for the purpose of allowing the defendant an opportunity to rebut what was contained in the presentence investigation report." Id. at 699-700. Interestingly, petitioner was permitted to present the testimony of twenty-six witnesses in mitigation of sentence and was thus afforded a benefit to which he was not entitled. The

failure of either the sentencing court or the Supreme Court of Florida to have been persuaded by such testimony to reduce the sentence imposed cannot be said to constitute error warranting review by this court. A review of that testimony reveals prejudices which were properly taken into account in the courts' review of its credibility.

More particularly, petitioner urges that this Court should review the reimposition of his sentence of death because of alleged defects in the sentencing court's finding of statutory aggravating circumstances.[1] Again petitioner fails to understand the nature of the proceedings below. The fact is that the written findings of the sentencing court on reimposition of sentence are virtually identical to the original findings made at the court's initial imposition of the sentence of death. The primary difference is that the new findings take into account the testimony presented by petitioner at the hearing below.[2] This is important because the Supreme Court of Florida in its review of the original imposition of sentence rejected, as applicable to petitioner, the two aggravating circumstances which serve as the basis for petitioner's initial point. Barclay, 343 So.2d, at 1271 fn. 3. Nonetheless, the court found that four other aggravating circumstances (which also appear in the second findings in support of sentence) were "well documented in the

---

[1] Petitioner maintains that it was error for the sentencing court to have found the existence of the aggravating circumstances set forth in s. 921.141(5)(a), F.S. ("The capital felony was committed by a person under sentence of imprisonment") and s. 921.141(5)(b) ("The defendant was previously convicted of another felony involving the use or threat of violence to the person.")

[2] A more thorough discussion of the extent to which petitioner is in error in suggesting that the sentencing court failed to consider the testimony presented at the hearing is contained in our response to petitioner's second point.

record before us."[3] Id. Surely petitioner would not suggest that the Supreme Court of Florida, in its review of death penalty cases, is not free to reject the applicability of aggravating circumstances and yet, on balance, find the existence of sufficient outweighing aggravating circumstances to warrant an affirmance of the penalty imposed. See, for example, Cooper v. State, 336 So.2d 1133 (Fla. 1976), wherein the court found the death penalty appropriate even though the killing was not especially heinous, atrocious or cruel as the sentencing court had found it to be.

Again, the procedural protection afforded petitioner by the Supreme Court of Florida following this Court's decision in Gardner did not wipe the slate clean, as petitioner would contend, thus requiring a full sentencing hearing and review thereof. Rather, at the conclusion of the hearing below and reimposition of sentence, petitioner was in the same status he held prior to the hearing, except that prior to the hearing there was some question whether petitioner's rights under Gardner had been violated, and after the hearing there was none. It was thus the duty of the Supreme Court of Florida to determine whether any information in the presentence investigation report was erroneous, misleading, or prejudicial. The court properly concluded:

> We now hold that Dougan was not prejudiced by the trial court's early consideration of a pre-sentence investigation report which his counsel originally had no opportunity to rebut, that the original findings of the trial court were not tainted or otherwise rendered invalid by the pre-sentence investigation report, and that the reimposition of a death penalty was proper. We affirm the sentence imposed by the trial judge.

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[3] These circumstances are as set forth in s. 921.141(c) ("The defendant knowingly created a great risk of death to many persons"); (5)(d) ("The capital felony was committed while the defendant was engaged...in the commission of... [a] kidnapping..."); (5)(g) ("The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws"); and (5)(h) ("The capital felony was especially heinous, atrocious, or cruel").

Id. at 440-441.

Finally, while not necessary to the disposition of the appeal before it, the Supreme Court of Florida specifically noted that it had reviewed the contentions made by petitioner, some of which are included in the instant petition. Dougan, 398 So.2d, at 441 fn. 2. Thus, petitioner's contention to the contrary is simply not true. Accordingly, petitioner has presented nothing that would warrant further review by this Court.

II

WHETHER PETITIONER'S DEATH SENTENCE WAS IMPOSED IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AS DETAILED IN THIS COURT'S DECISION IN LOCKETT v. OHIO, 438 U.S. 586 (1978), WHERE THE TRIAL COURT AT A RESENTENCE HEARING ALLEGEDLY REFUSED TO EVEN CONSIDER SUBSTANTIAL APPLICABLE MITIGATING CIRCUMSTANCES PRESENTED BY PETITIONER.

Petitioner is simply incorrect in his assertions of error warranting further review by this Court and thus has afforded this Court no justification for the granting of the relief sought.

Initially, petitioner states that the sentencing judge refused to find the existence of the mitigating circumstance set forth in s. 921.141(6)(a), F.S. ("The defendant has no significant history of prior criminal activity"). In truth, the sentencing judge stated that this was "neither an aggravating or mitigating circumstance as to the defendant Dougan because the facts of the contempt of court are not known at this time." (Petitioner's Appendix C, at p. 17). The Florida Supreme Court has ruled that even if there is evidence of the existence of a mitigating circumstance, the jury or judge reviewing such evidence is not required to find the existence of the circumstance but is, rather, free to weigh the sufficiency of that evidence and its credibility in determining whether there is

a sufficient basis for finding such existence in favor of the defendant. Hargrave v. State, 366 So.2d 1 (Fla. 1978). Nonetheless, even if the sentencing judge should have found the existence of this mitigating circumstance, his failure to do so does not constitute error of constitutional dimension warranting review by this Court. A review of the aggravating and mitigating circumstances found to exist by the sentencing court and by the Florida Supreme Court in its initial review of the sentence imposed clearly reveals that, on balance, the sentence of death was appropriate. Barclay v. State, 343 So.2d 1266 (Fla. 1977); Dougan v. State, 398 So.2d 439 (Fla. 1981); petitioner's Appendix C.

Petitioner next suggests the applicability of the mitigating circumstance set forth in s. 921.141(6)(g), F.S. ("The age of the defendant at the time of the crime"). Petitioner was 27 years of age when he murdered Stephen Orlando because the latter had the misfortune of being white. It was entirely proper for the sentencing judge and the Florida Supreme Court to refuse to find that petitioner's age mitigated the appropriateness of the sentence of death. Similarly, the Florida Supreme Court has upheld a trial court's refusal to consider a twenty-one year old defendant's youth as a mitigating circumstance. Meeks v. State, 339 So.2d 186 (Fla. 1976). It was properly within the authority of the courts below to determine that petitioner's age did not justify a finding of the existence of the statutory mitigating circumstance being discussed.

Finally, petitioner contends that the sentencing judge refused to consider mitigating circumstances other than those enumerated in the statute. This is simply not true. Prior to reviewing the evidence presented at the hearing below for the purpose of setting forth in writing his reasons for reimposing the sentence of death, the sentencing judge stated: "Before

imposing sentence for Murder in the First Degree, this Judge has considered those matters brought out by the defendant, Mr. Dougan, in his responses to the PSI." (Petitioner's Appendix C, at p. 16) (emphasis added). Further evidence of this can be found in the judge's written findings.

For example, in rejecting the existence of the mitigating circumstance set forth in s. 921.141(6)(e), F.S. ("The defendant acted under extreme duress or under the substantial domination of another person"), the sentencing judge stated: "That at the responses to the pre-sentence report, approximately twenty-six persons spoke in behalf of Dougan. The consistent theme of their testimony was that he was active in a number of organizations in leadership capacity; that he was a doer, a mover and a leader." (Petitioner's Appendix C, at p. 20.) Additional reference to this evidence can be found at pp. 21, 22 of such appendix. Significantly, and in direct refutation of petitioner's contention that the sentencing judge had ignored his military record, the findings reflect petitioner's service in the military. (Petitioner's Appendix C, at p. 22.)

It is thus clear from the record that the sentencing judge reviewed the evidence presented at the hearing below but that he failed to find that it warranted imposition of a sentence of life imprisonment. Accordingly, petitioner's second contention is shown to be without merit.

III

WHETHER PETITIONER WAS DENIED HIS RIGHT TO A FAIR RESENTENCING PROCEEDING BEFORE A NEUTRAL AND DETACHED JUDGE, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WHERE THE JUDGE DECIDED THE ISSUE OF HIS OWN DISQUALIFICATION AND REFUSED TO DISQUALIFY HIMSELF AFTER THE PETITIONER HAD MOVED TO DISQUALIFY THE JUDGE FOR BIAS AND PREJUDICE.

Respondent rejects petitioner's contention that Judge Olliff should have recused himself and submits that the record

reveals a conscious attempt on petitioner's part to induce error which would result in such recusal as a means of obtaining a new judge. Moreover, the reasons stated in support of his motion are legally insufficient.

Case law over the years has amplified the provisions of Fla.Cr.P.R. 3.230(d) and § 38.10, F.S., in order for Florida trial courts to have certain guidelines to follow. For example, case law holds that a person seeking to disqualify a judge must show that his fear of bias is well-founded and not fanciful or frivolous and that it is supported in substance. Murray v. Caro, 17 So.2d 79 (Fla. 1944). This is only reasonable in that it would be very easy for a defendant to secure false affidavits from relatives, etc., who would be prone to succumbing to the temptations of fabricating an affidavit in order to help out their kin. Likewise, an overzealous attorney could do the same.

Case law in Florida also holds that a judge may deny a motion for recusal where the affidavits are legally insufficient. In order to do so, a judge is entitled to determine whether the affidavits meet the requirements of the applicable law. State ex rel. Jensen v. Cannon, 163 So.2d 535 (Fla.3d DCA 1964). Several cases hold that adverse judicial rulings are insufficient to demonstrate prejudice. Wilson v. Renfroe, 91 So.2d 857 (Fla. 1957); Suarez v. State, 115 So. 519 (Fla. 1928); State ex rel. Locke v. Sandler, 23 So.2d 276 (Fla. 1945). Overall, a trial court must examine the affidavits and determine the question of legal sufficiency--exactly what the trial court did.

1. The grounds alleged by petitioner to justify recusal are legally insufficient. It is ludicrous for petitioner to contend that because at the conclusion of the hearing the sentencing judge was shocked by the cruel and senseless murder that this makes him biased. Petitioner raised this issue in his original appeal to the Florida Supreme Court and it was found by

that court to be so inconsequential that it wasn't mentioned in the court's opinion. Barclay, supra, at 1266. Certainly, it was proper for the trial judge, when he originally sentenced petitioner to death and when he reimposed that sentence, to comment upon the horrible manner in which petitioner selectively murdered Stephen Orlando solely because of his race as a means of stirring up racial hatred and causing a race war. It cannot be reasonably urged that the Florida Supreme Court in adopting the trial judge's findings and commending him for his painstaking analysis thereby demonstrated a prejudice against petitioner. Something else--the sentencing judge's comparison in his original sentencing order of the racial hatred of petitioner to one with which he was familiar is not an indictment of the sentencing judge, but rather, of petitioner himself.

2. Lest there be any doubt as to petitioner's intentions at the hearing below, they are here clearly revealed. The record plainly shows that petitioner, aware that the trial court was restricted to a review of the motion and supporting affidavits for a determination of the legal sufficiency, attempted to lead the trial court into error which would have necessitated his recusal by requesting that the judge take the stand to explain his membership in three national organizations alleged to exclude blacks from their membership. It is well settled in Florida that an attorney cannot provide an incident rendering the judge disqualified to proceed with the case. State v. Himes, 36 So.2d 433 (Fla. 1948). Petitioner's reprehensible conduct in attempting to induce error should not be countenanced, much less rewarded, by this Court.

Moreover, respondent rejects petitioner's contention that the sentencing judge displayed a racial bias by referring to race in his resentencing order. It requires only cursory review of the order to see that race was an issue only because petitioner

chose for it to be. It was petitioner who brutally murdered Stephen Orlando because he was white and it was petitioner who attempted to instigate a race war!

3. Unlike Bundy v. Rudd, 366 So.2d 440 (Fla. 1978), upon which petitioner has modeled and molded his argument, the record sub judice does not clearly reveal the basis for the argument. The only mention in the record of alleged ex parte communications appears at R Vol.II, pp. 87-94, 96 and obviously refers to communications made during petitioner's trial in 1975. Respondent submits that while any such communications would be irrelevant to the hearing held four years later, we note the following statement of the trial court in rejecting petitioner's contention below:

> The motion filed by Mr. Nursey to disqualify the Judge for the reasons they have previously stated about in talking with the Attorney General's Office, which as their pleading shows was made known to the counsel for both sides in an effort to learn the status of the law, and which was not made a basis for error on any appeal that they took, and my opinion is not sufficient for this Court to disqualify itself.

(R Vol.II, p. 96) Respondent finds nothing in Bundy to suggest that the trial court's opinion is in error.

4. Petitioner's next assertion can only be described as frivolous. It is asserted that in wholly unrelated cases the trial court may have engaged in ex parte communications indicative of a prosecutorial attitude. Frankly, such a contention is so remote that it constitutes nothing more than a general allegation of prejudice. This is wholly insufficient to warrant recusal. State ex rel. Aguiar v. Chappell, 344 So.2d 925, 926 (Fla. 3d DCA 1977).

5. In its initial review of the sentence imposed upon petitioner, the Supreme Court of Florida commended the trial

court for conducting the full and proper analysis required by law for sentencing in a capital case. Please note the following:

> The judge before whom these cases were tried meticulously identified in writing each aggravating and mitigating circumstance listed in the death penalty statute, and he commented with specifity as to the relevance and weight to be accorded each.

Barclay, 343 So.2d, at 1270.

There is nothing in the record to suggest that the lower court did any less on resentencing. The sentencing court's rejection of the testimony presented at the hearing below for purposes of mitigation of sentence was entirely justified. It is unnecessary to undertake an extensive review of this trial judge's actions in other capital cases. But it should be emphasized that regardless of whether this judge has rejected advisory recommendations of a sentencing jury in other cases, the jury sub judice recommended that petitioner be sentenced to death. Furthermore, the Supreme Court of Florida noted this particular judge's experience in Dobbert v. Florida, 375 So.2d 1069, 1071 (Fla. 1979). This Court had similar praise for this particular judge in its review of Dobbert v. Florida, 432 U.S. 282 (1977). The imposition of the death sentence is an arduous burden placed upon the judiciary and, in particular, upon sentencing courts. In imposing such a sentence, a judge who calls upon his experiences in weighing the evidence before him cannot be faulted for doing so as long as his ultimate decision is fair and fully supported by the record. The Supreme Court of Florida has now twice determined that the sentence was appropriate. Nothing suggested by petitioner in his final point can disturb the appropriateness and correctness of that determination.

CONCLUSION

The petition for writ of certiorari should be denied.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have furnished a copy of the foregoing Brief for Respondent in Opposition to Mr. Joseph M. Nursey, 15 Peachtree St., N.E., Ste. 831, Atlanta, Georgia 30303, by U.S. mail, this 25th day of August 1981.

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